

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MATTHEW SCOTT ELDER

Claimant

V.

SPIRIT AEROSYSTEMS, INC.

Respondent

AND

INSURANCE COMPANY OF

STATE OF PENNSYLVANIA

Insurance Carrier

Docket No. 1,066,481

ORDER

STATEMENT OF THE CASE

Claimant appealed the March 4, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 26, 2015, preliminary hearing and exhibits thereto; the transcript of the January 14, 2015, deposition of Dr. David Hufford; and all pleadings contained in the administrative file.

ISSUES

Did claimant sustain personal injury by repetitive trauma arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's Application for Hearing, filed on August 9, 2013, asserts he sustained mid and low back injuries by repetitive trauma, but did not specify a date of injury. At the preliminary hearing, claimant requested medical treatment for his injuries.

Claimant has not testified in this matter. Claimant's counsel proffered that in early 2013, while working for respondent, claimant sustained bilateral knee injuries. Claimant worked on his knees as a sealer, a job that required a lot of repetitive kneeling and squatting. Claimant underwent right knee surgery on April 1, 2013. As a result, claimant received work restrictions of no kneeling or squatting. In order not to violate his work restrictions, claimant performed his work activities by bending over in a repetitive manner. Claimant alleged he hurt his low back as a result.

Respondent authorized treatment for claimant's back with Dr. John P. Estivo, who first saw claimant on October 16, 2013. Claimant gave Dr. Estivo a history of injury that was similar to that proffered by his counsel at the preliminary hearing. Claimant reported he was released with regard to his right knee in August 2013 by his treating physician, Dr. Prohaska.

X-rays of the lumbar spine revealed no fractures, subluxation, dislocation, destructive lesions, signs of instability nor any acute abnormalities. An October 9, 2013, MRI revealed mild age-related degenerative disc disease at L3-4, L4-5 and L5-S1 and slight bulging to the degenerative discs at L4-5 and L5-S1, but no neural impingement, herniated discs or acute abnormalities. Dr. Estivo's impressions were preexisting age-related degenerative lumbar disc disease unrelated to the injury claim of February 11, 2013, and a lumbar spine strain. The doctor noted the bulging discs developed as a result of aging. The doctor recommended physical therapy, prescribed medication and imposed temporary work restrictions.

After claimant completed physical therapy, he was seen by Dr. Estivo on November 14, 2013. The doctor's impressions were preexisting age-related degenerative lumbar disc disease unrelated to the injury claim of February 11, 2013, and a resolved lumbar spine strain. Dr. Estivo indicated claimant reached maximum medical improvement, required no restrictions regarding his lumbar spine and sustained no permanent functional impairment.

On February 12, 2014, Dr. Estivo reevaluated claimant. The doctor noted claimant's thoracic and lumbar spines were non-tender to palpation with no guarding or muscle spasm. Claimant extended and side bent his lumbar spine without pain or hesitation. Claimant was able to toe and heel walk and no sensory or motor deficits to the lower extremities were noted. The doctor indicated there was no right or left hip tenderness and no tenderness over the greater trochanteric bursa of either hip to palpation. Dr. Estivo indicated claimant had a completely normal examination. The doctor's impressions were a resolved lumbar spine strain in relation to the injury claim of February 11, 2013, and preexisting age-related degenerative lumbar disc disease. Dr. Estivo indicated claimant had no restrictions and no permanent functional impairment.

At the request of his counsel, claimant was evaluated by Dr. George G. Fluter on December 18, 2013. The doctor reviewed claimant's medical records. Dr. Fluter's medical

record review did not mention that he reviewed the October 9, 2013, MRI, but did indicate he reviewed Dr. Estivo's records that discussed the MRI. Claimant reported pain affecting the right posterior shoulder/middle back/lower back and right knee/lower leg.

Dr. Flutter indicated claimant had tenderness to palpation in the lumbar paravertebral muscles and buttocks, over the posterosuperior iliac spine, sacroiliac joints and the greater trochanters. The doctor noted simulated trunk rotation and axial loading caused back pain. With regard to claimant's back condition, Dr. Flutter's assessments were low back pain, lumbosacral strain/sprain, probable sacroiliac joint dysfunction and probable trochanteric bursitis. The doctor recommended a lumbar spine MRI, an EMG, trial use of a TENS unit, medication and use of a lumbar support brace.

At the request of former ALJ John D. Clark, claimant was evaluated by Dr. Hufford on July 1, 2014. Claimant gave a history of a gradual onset of low back pain that has continued to the present time. Claimant attributed the low back pain to bending forward in flexion at the waist because of restrictions from his right knee injury of avoiding kneeling and squatting. Dr. Hufford's examination of the lumbar spine revealed no direct vertebral tenderness. There was diffuse tenderness throughout the lumbar paraspinal musculature without trigger points or guarding. There was no direct left, but there was minimal right tenderness of the sacroiliac joint. Dr. Hufford indicated that June 24, 2014, x-rays showed essentially normal findings. The lumbar MRI report noted degenerative changes in the lumbar spine without any evidence of disc herniation or focal neural foraminal narrowing.

When asked his diagnosis of claimant's condition, Dr. Hufford responded:

Well, my diagnosis or my assessment of his condition in general is that he did have a myofascial or musculoskeletal component, which would be considered the strain part. My belief is that his residual symptomatology was present due to the degenerative disk disease and that myofascial component had been treated and should resolve without residual problems. I also believe that he had an aggravation of the degenerative disk disease that was present and that was responsible for his residual symptomatology, which included a right leg radicular component.¹

Dr. Hufford explained that if a person lifted something heavy and experienced a sudden onset of low back pain, that would be consistent with a traumatic result where muscle fibers could tear. However, it is not nearly as clear where there is not one specific acute trauma. Dr. Hufford indicated claimant likely had inflammation in two separate areas that form the anatomy of his spine. The inflammation may not be observable, but caused claimant's pain. Dr. Hufford testified:

Q. Does something change within the body's structure that results in pain?

¹ Hufford Depo. at 11-12.

A. It may, but again, it is very difficult to correlate what that change is. This is the difficulty when we discuss the prevailing factor as it relates to those injuries. I try and have made a habit now of using the phrase acute tissue trauma, and when I say acute tissue trauma, I'm using that in the sense that there has been an acute event. In the cases where we deal with repetitive use, I believe that it is much more difficult to pinpoint and accurately describe what the tissue alteration has been. . . . The first portion of the way to answer your question when it comes to a repetitive trauma is that at least in theory, for someone to develop symptomatology, there may be some alteration in the tissue. That is the superficial and general answer, and as I've testified within the last few minutes, it may be impossible to define or describe in any objective manner what that alteration is. Secondly, however, if there is no objective alteration in the tissue that we can measure, then it becomes very hard to say that there has been a definitive change in the tissue that has led to the person's symptoms. That is why I answered we just don't know. And in cases of repetitive trauma, that is often the case, we just don't know what is generating the pain.²

Dr. Hufford indicated pain was the prevailing factor causing the strain and requiring the need for treatment of claimant's low back condition and the pain was caused by the change in his body mechanics at work. He testified the prevailing factor for claimant's current condition is "[t]he degenerative disk disease as an underlying and pre-existing condition."³ The doctor indicated the degenerative disc disease was separate and apart from the myofascial pain.

The ALJ ruled:

. . . at most, Claimant is arguing that he has a change in his physical condition in the form of inflammation, which Dr. Hufford, the Court-ordered IME physician testified cannot be confirmed. Rather, it is suspected that if pain is present, inflammation is present as well. However, it is not a change that could be discovered with an x-ray, MRI, or other similar diagnostic test. Dr. Hufford's testimony that inflammation may be the cause of Claimant's pain complaints is insufficient to constitute evidence of a change in physical condition that overcomes the limitations set forth in K.S.A. 44-508(f)(2).

Additionally, pursuant to K.S.A. 44-508(f)(2)(A)(iii), Claimant has the burden to prove that "the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment." Dr. Hufford opined that the prevailing factor in Claimant's current symptomatology and need for continued medical treatment is his degenerative disc disease. The Court agrees.

² *Id.* at 14-15.

³ *Id.* at 33.

Based on the foregoing, Claimant's request for authorization of additional medical treatment is denied.⁴

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁶

Respondent argues claimant failed to prove his work injury by repetitive trauma caused a change in the physical structure of his body and, therefore, he did not sustain a personal injury. This Board Member disagrees. The Board previously addressed this issue in *Tripoli*,⁷ when it stated:

At oral argument, respondent contended injuries such as sprains, strains and headaches that are not revealed by a diagnostic test are not injuries as defined by K.S.A. 2011 Supp. 44-508(f)(1). Respondent asserts no diagnostic test showed claimant had a change in the physical structure of his body and, therefore, claimant did not sustain an injury to his cervical or lumbar spine. The Board disagrees with respondent's analysis. Dr. Dobyns testified that prior to the MRI being invented, bulging discs could not be detected, as they do not show up on x-rays. The doctor then indicated some day more sensitive diagnostic tests may be developed that can show more physical abnormalities. Because a diagnostic test reveals no change in physical structure does not mean one has not taken place or there is no injury.

Drs. Estivo, Fluter and Hufford diagnosed claimant with a work-related lumbar strain, although Dr. Hufford was reluctant to use that term. As explained by Dr. Hufford, in the case of a lumbar strain, it may be difficult, if not impossible, to show a tissue alteration or change. Nevertheless, all three physicians concurred claimant sustained a lumbar injury as the result of his repetitive work activities.

Drs. Estivo and Hufford concluded claimant had preexisting lumbar spine degenerative disc disease. Dr. Hufford indicated claimant aggravated his preexisting

⁴ ALJ Order at 3-4.

⁵ K.S.A. 2013 Supp. 44-501b(c).

⁶ K.S.A. 2013 Supp. 44-508(h).

⁷ *Tripoli v. Vatterott Education Holdings, Inc.*, No. 1,059,113, 2014 WL 3886812 (Kan. WCAB July 31, 2014).

degenerative disc disease and that was responsible for his residual symptomatology, which included a right leg radicular component. Dr. Fluter did not diagnose claimant with preexisting degenerative disc disease. However, he did not review claimant's October 9, 2013, MRI showing claimant had preexisting degenerative disc disease.

This Board Member finds claimant's repetitive work activities were the prevailing factor causing claimant's lumbar back strain. The undersigned further finds that pursuant to K.S.A. 2013 Supp. 44-508(f)(2), the aggravation of claimant's preexisting degenerative disc disease is not compensable.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, the undersigned Board Member modifies the March 4, 2015, preliminary hearing Order entered by ALJ Marchant to find claimant sustained a lumbar strain injury by repetitive trauma arising out of and in the course of his employment with respondent. This claim is remanded to the ALJ to determine what, if any, medical treatment is reasonably necessary to cure and relieve the effects of claimant's lumbar strain.

IT IS SO ORDERED.

Dated this ____ day of May, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Ali Marchant, Administrative Law Judge

⁸ K.S.A. 2013 Supp. 44-534a.

⁹ K.S.A. 2013 Supp. 44-555c(j).